

DOCUMENT RESUME

ED 260 632

HE 018 621

AUTHOR Goldstein, Michael B.
TITLE Legal Issues in Experiential Education. PANEL
Resource Paper #3.
INSTITUTION National Society for Internships and Experiential
Education, Raleigh, NC. Peer Assistance Network in
Experiential Learning.
PUB DATE [81]
NOTE 14p.; For related documents, see HE 018 617-635.
PUB TYPE Guides - Non-Classroom Use (055)
EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS Accountability; Administrator Responsibility; College
Students; Court Litigation; *Educational Malpractice;
*Experiential Learning; Field Experience Programs;
Higher Education; *Injuries; Insurance; Internship
Programs; *Legal Responsibility; Performance
Contracts; School Business Relationship; School
Community Relationship

ABSTRACT

Legal issues relevant to experiential learning are identified to help program administrators know when to seek expert assistance and advice. Much of the law of experiential learning is based on specific statutory provisions and decisions. The student involved in experiential learning may assume certain learning outcomes very different from those of the institution, and the understood requirements for the award of credit or credentials for the learning may also differ. These variances may result in a lawsuit, with the student alleging a breach of an implied or expressed contract of instruction. A written learning contract should state the mutual rights and responsibilities of the learner and the institution. Other issues are whether the college or agency should be held liable for acts of the student when agency clients are injured. Insurance against liability caused by the acts of its students is a wise investment. Having students sign a waiver of liability is not necessarily adequate protection against risk of injury to the student. Attention is also directed to agreements between the college and the agency, responsibilities of the student and the college, and implications of using federal funds. (SW)

* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *

nsiee

ED260632

PEER ASSISTANCE NETWORK IN EXPERIENTIAL LEARNING



Toll Free (800) 424-2933
Local Calls 331-1516

Panel Resource Paper #3

LEGAL ISSUES IN EXPERIENTIAL EDUCATION

Michael B. Goldstein
NSIEE General Counsel

U.S. DEPARTMENT OF EDUCATION
NATIONAL INSTITUTE OF EDUCATION
EDUCATIONAL RESOURCES INFORMATION
CENTER (ERIC)

This document has been reproduced as
received from the person or organization
originating it.

Minor changes have been made to improve
reproduction quality.

Points of view or opinions stated in this docu-
ment do not necessarily represent official NIE
position or policy.

"PERMISSION TO REPRODUCE THIS
MATERIAL HAS BEEN GRANTED BY

~~National Society for~~
Internships and
Experiential Education

TO THE EDUCATIONAL RESOURCES
INFORMATION CENTER (ERIC)."

NATIONAL SOCIETY FOR INTERNSHIPS AND EXPERIENTIAL EDUCATION

Suite 601 1735 Eye Street, N.W. Washington, D.C. 20006

LEGAL ISSUES IN EXPERIENTIAL EDUCATION

*Michael B. Goldstein

NSIEE General Counsel

This PANEL paper is intended to identify key legal issues of experiential learning, sufficient to enable program administrators to know when to seek expert assistance and advice. Because much of the law of experiential learning is based on specific statutory provisions and decisions, the involvement of counsel to review the particular program or activity is strongly urged.

The field of experiential learning has grown rapidly in recent years, not only in terms of the numbers of individuals engaged in such activities but also in the increasing variety of approaches that have become subsumed within this term.

With this growth has come a recognition of the complexity of the experiential education field, and the legal issues and problems which may surround it. Because legal consequences may often be serious, not to mention costly, the reader is urged to consult competent counsel whenever an apparent legal issue arises. A few hours of preventive effort may avoid a far more difficult--and expensive--struggle later on.

I. Responsibilities of the Educational Institution

A universal characteristic of experiential learning is its relationship to the educational program or pursuits of the learner. As such, the institution supervising that program is assuming a certain level of responsibility for its educational fulfillment.

A. Value of the Learning Experience: When a student enrolls in an educational institution, he or she enters into a contract of enrollment. Generally, the institution's catalogue embodies the elements of

*MICHAEL B. GOLDSTEIN, a partner with the Washington, D. C. law firm of Dow, Lohnes & Albertson, has served as counsel to NSIEE and its predecessor organizations since 1970.

that contract, although the application form and other material may supplement or modify it. The contract may also be modified by action of the institution and the student, when ratified or relied upon by the other party. The consequences of this concept are significant for the experiential learning process.

In a conventional course, the student and the institution have relatively clear expectations of requirements and outcomes. Often, this is not the case with experiential learning. The student may assume certain learning outcomes very different from those of the institution, and the understood requirements necessary to allow the institution to award credit or otherwise credential the learning may likewise differ. The result of such a variance at best will be confusion and a diminution of the value of the learning experience; at worst, it may result in a lawsuit, with the student alleging a breach of an implied or expressed contract of instruction.

The solution is to seek the highest level of mutual understanding and agreement, where possible set forth in writing. This may be in the form of a description of the experiential learning program, similar to a catalogue entry, or it may be in the form of a learning contract entered into between the student and the institution.

But is a learning contract a true contract? Many institutions and students have gotten into difficulty because they assumed the answer to be entirely one way or the other. Very simply put, a "contract" is nothing more than an agreement between two parties that sets forth mutual rights and responsibilities. It may be written in highly legalistic form, replete with whereas and whereat clauses, or it may be in the form of the most basic letter, or even a verbal affirmation. The critical

issue (independent of whether its terms can be proven, the chief weakness of a verbal contract) is whether it sets forth the mutual rights and responsibilities of both parties. An agreement that only sets forth the rights and responsibilities of one party, and not of the other, may fail for want of consideration: that is, the party binding itself gets nothing in return.

A learning contract not only may but should be a binding agreement. It need not have all the formalistic trappings, but it must clearly and concisely set forth the relative rights, responsibilities and expectations of the student and the institution (and often of the entity where the student will carry out the experiential learning activities as well). The better and the more complete the agreement, the less likely problems will arise in the future.

B. Liability for the Acts of the Learner: If an experiential learning program may be considered the outcome of an agreement between the student and the institution, may the institution be held liable for the acts of the student? This is a quite serious question, for unlike on-campus activities the potential for serious liability is very real. The simplest example is where a student is involved in an automobile accident, injuring herself, some clients of the agency for which she is working, and other persons. Could the institution be held responsible for these damages?

The answer may be in the affirmative, but only in a highly qualified sense. Ordinarily, as will be discussed below, responsibility for the acts of the student will be ascribed to the entity for which the student is working. Injured parties would not, in most cases, be able to reach back to the institution. However, suppose that in the above example,

the student was prone to frequent lapses of consciousness, a fact known to the institution but not revealed to the agency. If the proximate cause of the accident was a loss of consciousness, then it is indeed possible that the institution could be held liable for damages.

The guiding principle must be to inform the organization at which the student will be carrying out his or her activities of any information that might bear upon the student's capacity to perform the tasks, and particularly to inform any potential risks, either to the student or to those around him or her. However, it is also important to respect the privacy of the student: questions of potential privileged information or violations of the Privacy Act should be discussed with counsel.

The institution must be aware of its responsibility to take reasonable care to insure that the assignment of a student to a sponsored learning activity does not pose an unreasonable risk. At the same time, the institution cannot, and should not represent to, guarantee the ability of the student to carry out those tasks, so long as it has acted with care and prudence.

Insurance against liability caused by the acts of its students is a wise investment. The institution's risk management officer or counsel should be consulted with regard to the extent of present coverage and necessary additions.

C. Liability for Injury to the Learner: What of the case where a student is injured while performing an experiential learning activity? Conventional wisdom has been that once the student is beyond the direct control of the institution there is no liability for any injury which may occur. However, recent cases have cast that theory into doubt, and the prudent institution will act with care in this area.

The key element here, as in the case of liability for injury to others, is the prior knowledge of the institution. If the institution (or its employees) knew, or should have known, of a risk to the student, then if the student is indeed injured the school may be held liable. Assigning the student to a worksite known to be dangerous may open the institution to just such liability. However, this is not to say that students cannot be assigned to relatively hazardous activities. For example, many forms of cooperative education work in the private sector have traditionally been in the industrial area, where work-related injuries are not uncommon. If the institution is at all involved in inspecting the workplace, it must ascertain that there are no unusual hazards. The degree to which the institution seeks to ascertain the safety of the work and the workplace is a function of the type of program and the resources of the institution. Administrators should be aware, however, that the more responsibility the institution assumes for investigating the safety of the work and the worksite, the more closely it may be held accountable for its errors.

C(a). Waivers and Assumption of Risk: The most frequent response to questions of risk to the student is the suggestion that the student (and usually his or her parents) sign a waiver of liability. Regrettably, such documents are, by and large, utterly useless. A very basic legal theory provides that one cannot waive the consequences of someone else's negligence: if you negligently run me down on the street, the fact that I previously signed a waiver of liability in your favor would be meaningless.

Assumption of risk is a quite different legal concept, with far more value in the experiential learning arena. This theory permits an in-

dividual to knowingly engage in conduct which may contain certain risks without liability to another. School athletic programs are a very good example: a student playing on the football team assumes the risk of injury that goes with playing football. But that assumption of risk is limited to the ordinary risks: if the student is injured because the school issued him a defective or improperly fitted helmet, the school will almost surely be held responsible, regardless of whether the student signed a waiver or not.

To take advantage of the protection afforded by the assumption of risk theory, the student must be informed in advance of any risks inherent in the work to be performed, and knowingly consent to undertake such risks. In the case of minor students, parental consent may also be useful, although this varies from state to state. Examples of experiential learning assignments where informed consent is important are the medical and psychiatric areas, criminal justice activities, and field expeditions.

C(b). Insurance: Most risks to the institution can be covered by appropriate commercial insurance. However, very often institutional policies will exclude from coverage liability arising out of the activities of students beyond the direct control of the institution. The school's risk management officer or attorney should be consulted to determine the extend to which present insurance provides sufficient protection, and the propriety of obtaining additional coverage for any unprotected risks.

C(c). Indemnification: Indemnification is nothing more than a form of insurance, with another private party agreeing to protect the indemnified party from loss, just as an insurance company agrees to do so for

the policy holder. The agreement between the institution and an experience providing entity may provide for one or the other party to indemnify the other from loss, regardless of who is at fault. Unlike waivers of liability, indemnification agreements are generally enforceable. Therefore, they should be entered into only with the careful review of counsel.

II. Responsibilities of the Experience Provider

All the issues of liability that may accrue against the institution are likewise issues of concern to the agency, organization or entity that is providing the student with the experiential learning opportunity, only more so. The acts of the student will almost certainly be imputed back to the organization to which the student is assigned. The degree to which that organization will be liable depends on several interrelated factors.

A. Existence of an Employment Relationship: The existence of an employer-employee relationship prescribes a whole galaxy of other consequences. The highest level of liability will arise from the acts of employees. Likewise, certain provisions of federal and state law involving the employment of minors, minimum wage, unemployment and workmen's compensation and taxation must be considered. While these issues are too complex to be discussed in this summary paper, where the employer-employee relationship is deemed to exist counsel should be consulted to insure that all appropriate requirements are met.

The existence of the employer-employee relationship depends only in part upon the payment of compensation. The cases are divided whether a person may be "employed" without being paid for the work: the Fair Labor Standards Act implies that one cannot, but the cases and decisions remain unclear. Payment of compensation generally does

create an employment relationship, although in certain circumstances the recipient may be deemed an independent contractor and not an employee. While liability tax and other consequences are very different in the case of independent contractors, it is not enough to simply declare that a learner is an independent contractor and not an employee. Issues of the level of control over the work to be performed, the power to hire and fire, the provision of the workplace and instruments of work, and the manner of payment and calculation of rate all figure into the determination of whether one is an employee or independent contractor. Declaring that payment is a "stipend" or "scholarship" and not compensation is in itself virtually meaningless: for example, the form of payment and the nature of the involvement must meet certain very narrowly defined tests to be considered scholarship or fellowship aid and therefore not subject to taxation. Unless counsel has advised that payments to a student are specifically not includable as taxable income, it is unwise to advise students that the payments are anything but taxable compensation. The terms scholarship and fellowship are narrowly defined in the tax code, and unless the payments meet those rigid definitions the tax exclusion will not apply. The term "stipend" is not a term of art, and should not be construed to render payments free from tax. Unless the student is an independent contractor, if the experience provider is paying the compensation appropriate taxes must be withheld and remitted. However, if the school is paying the student, then a different set of rules may apply, and the sum in question may be excludable. (Note that payments made to students under the College Work-Study Program are virtually without exception considered to be compensation for work performed and are fully taxable, regardless of whether payments are made by the institu-

tion or the experience providing entity.)

B. Liability for the Acts of the Learner: Unlike the case of the institution, the provider of the experience will in most cases be liable, under theories of master-servant, for the acts of the learner. Only if it can be shown that the student was acting entirely outside of the scope of his or her assignment or was acting as an independent contractor and not as the agent of the organization might the provider avoid liability for the negligence of the student. However, insuring against such liability is relatively easy and, in most cases, very inexpensive. Counsel should be consulted, however, to ascertain how the work of the students can be so covered.

C. Liability for Injury to the Learner: Again, the experience provider will generally be held liable for injuries arising out of its negligence. Where the student is deemed an employee, Workmen's Compensation statutes may provide protection. Otherwise, the student is generally free to seek compensation without the limitations imposed by Workmen's Compensation laws. Such risk can be protected against through proper insurance.

The provider may be able to transfer liability to the institution, both for injury to the student and damages caused by the student, where the institution can be shown to have acted negligently in assigning the students. Where both the institution and the experience provider share the supervision of the student, the determination of liability becomes considerably more complex.

D. Institution-Experience Provider Agreements: Because of the potential complexity of the relationship between the institution and the ex-

perience provider, it is always advisable that the parties enter into a written agreement setting forth their mutual rights and responsibilities. Elements to be considered for inclusion are identification of the employer, liability and indemnification, control of the work, role of the institutional experiential learning supervisor, student reports and writing requirements, confidentiality of information, duration of the assignment, right to suspend or dismiss, and the nature and manner of compensation, if any. Institution-provider agreements embody important legal rights and responsibilities and should be prepared with the advice of counsel. In most cases, it is appropriate for the learner to receive a copy of the agreement, and often it is useful for the learner to signify his or her understanding by signing a copy. As noted below, the student may be also a party to the agreement.

III. Responsibilities of the Student

Although much time is spent discussing the relative roles and responsibilities of the institution and the experience provider, the basic reason for any program of experiential learning is to serve the student and to promote his or her educational objectives. With that in mind, it is essential that the student fully understand his or her rights and responsibilities. The growing willingness to seek legal redress makes such a step not just morally correct but economically imperative.

The responsibilities of the student are to both the institution and to the experience provider. To the institution the student owes the obligation to carry out the experiential learning activities in such a manner as will merit the award of credit or other credentialing. This may encompass the keeping of a journal, attendance at seminars, preparation of papers or oral

presentations. The student must be fully aware of these requirements in advance of entering into the program; otherwise, the institution may have difficulty in enforcing its rights.

To the experience provider the student owes the responsibility of carrying out the assigned tasks in a proper manner. The more the relationship is one of employer-employee, the more the student must work under the direct control and supervision of the provider. The problems arise where the relationship is fluid, and less well defined, where the identity of the party to control the work is vague and the student thus lacks adequate guidance. It is cases such as these, where the student lacks an understanding of to whom he or she is responsible, that the most serious legal problems may arise. The participation of the student in the experiential learning agreement can go a long way towards resolving such ambiguities.

IV. Implications of Using Federal Funds

Experiential learning programs that rely on specific federal source of funds, such as College Work-Study and Cooperative Education, must comply with the statutory and regulatory requirements of these programs. Where the funds flow through the institution, as in the case of Cooperative Education and Work-Study, responsibility for their proper utilization rests entirely with the institution: the government will not look to the experience provider but rather will demand reimbursement from the institution. The institution can protect itself in part through the provisions of its agreement with the experience providing entity, but it should be constantly aware of its primary responsibility.

Of particular importance to institutions and experience providing entities alike is the fact that participation in these programs brings with it

coverage under the several antidiscrimination statutes and Executive Orders. For example, an institution may not assign College Work-Study students to an entity that discriminates against the handicapped in violation of the Federal law, on pain of having its eligibility to receive federal funds jeopardized. Advice of counsel should be sought whenever any questions of discriminatory treatment arise.

Because the 1980 Higher Education Reauthorization mandates institutions to use College Work-Study funds in ways that serve the educational and vocational needs of the participating students, the utilization of this large resource for experiential learning activities is likely to dramatically increase. A new program of Work-Study for Community Service-Learning, as well as the expansion of the Cooperative Education definition to encompass parallel as well as alternating periods of work and study will also have the effect of increasing the utilization of federal funds in the experiential learning arena.